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In the Supreme Court of the United States.

OCTOBER TERM, 1940.

No. 194

MARYLAND CASUALTY COMPANY, a corporation,
Petitioner,

vs.

PACIFIC COAL & OIL COMPANY, a corporation,
and JOE ORTECA,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals For the Sixth Circuit, and BRIEF IN SUPPORT OF PETITION.

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PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of the Maryland Casualty Company respectfully shows to this Honorable Court:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner filed its petition for a declaratory judgment, under Judicial Code Section 274 (d), (28 U. S. C. A. 400), against Pacific Coal & Oil Company and Joe Orteca on August 3, 1938 in the District Court of the United States for the Northern District of Ohio, Eastern Division (R. 2).

It is alleged in said petition that there is diversity of citizenship and that the amount involved exceeds Three Thousand Dollars ($3,000.00), exclusive of interest and costs (R. 2).

The petition further alleges that the Maryland Casualty Company issued to the Pacific Coal & Oil Company a policy of liability insurance, under the terms of which the Maryland Casualty Company obligated itself to defend all actions brought against assured and to pay all sums which assured might become obligated to pay for bodily injuries or destruction of property caused by automobiles

hired by the assured (R. 2); that on February 24, 1936, while said policy was in full force and effect, a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford operated by an employe of the Pacific Coal & Oil Company; that defendant, Joe Orteca, received personal injuries in said collision and filed suit in the Common Pleas Court of Cuyahoga County in the amount of $25,250.00 to recover therefor (R. 4); that a controversy exists as to whether the 1931 Ford was a hired automobile covered by the terms of the Maryland Casualty Company's policy (R. 4); that the Maryland Casualty Company's obligation to defend said action in the state court depended upon whether or not said 1931 Ford was or was not a hired automobile within the meaning of the policy. The prayer then asked the court to declare the rights of the parties (R. 5).

The Pacific Coal & Oil Company filed an answer thereto and Joe Orteca, on August 15, 1938, filed a demurrer (R. 6) upon the ground that no cause of action was stated in the petition as against him, and upon the further ground that he was not a proper party. Joe Orteca's demurrer was sustained by the court September 12, 1938 (R. 8) and plaintiff not desiring to plead further, final judgment was entered on October 3, 1938 in favor of Joe Orteca and against the Maryland Casualty Company (R. 9), from which judgment an appeal was taken to the United States Circuit Court of Appeals for the Sixth Circuit (R. 9). In that Court, on the 8th day of April, 1940, the decision of the District Court was affirmed upon the ground that no cause of action was stated against Orteca (R. 15).

BASIS FOR JURISDICTION.

Petitioner says that Section 240, United States Judicial Code (U. S. C. A. Title 28, Section 347) is the basis upon which petitioner contends that this Court has jurisdiction to review the judgment in question. Said section reads in part as follows:

"(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

* * *

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

Petitioner further says that its suit in the District Court was brought under Section 274 (d) of the Judicial Code (U. S. C. A. Title 28, Section 400) which reads in part as follows:

"(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

THE QUESTION PRESENTED.

Did the Circuit Court of Appeals for the Sixth Circuit err in affirming the judgment of the District Court which sustained a demurrer of the injured claimant who was party defendant to a declaratory judgment suit filed by an insurance company under Judicial Code, Section 274 (d), (28 U. S. C. A. 400), for the purpose of ascertaining its liability under an automobile liability insurance policy

issued by it? The demurrer was sustained on the ground that the injured claimant had previously filed suit in a state court against the assured, also a party to the instant case; that said state court suit had not proceeded to judgment at the time of bringing the declaratory judgment suit; and that, therefore, the insurance company had no cause of action against the injured claimant.

Or, to state the question generally, may an insurer of a defendant's tort liability obtain a declaration of its rights as against an injured claimant before the latter has secured judgment against the assured?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The United States Circuit Court of Appeals for the Sixth Circuit in the instant case has rendered a decision in conflict with the following decisions of other Circuit Courts of Appeals on the same matter:

Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., 111 F. (2d) 443 (1st Circuit, 1940);

Central Surety and Insurance Corporation vs. Norris, et al., 103 F. (2d) 116 (5th Circuit, 1939);

Maryland Casualty Co. vs. Consumers Finance Service, Inc. of Pennsylvania, et al., 101 F. (2d) 514 (3rd Circuit, 1938);

United States Fidelity and Guaranty Co. vs. Pierson, et al., 97 F. (2d) 560 (8th Circuit, 1938).

Furthermore, the question involved in this case arises under the Federal Declaratory Judgments Act and represents an important matter which ought to be settled by this Honorable Court.

PRAYER.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8172, Maryland Casualty Company, a corporation, Plaintiff-Appellant, vs. Pacific Coal & Oil Company and Joe Orteca, Defendants-Appellees, and that the said judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MARYLAND CASUALTY COMPANY,
By PACA OBERLIN,
Counsel for Petitioner.

M. E. BROOKS,
WILLIAM F. STECK,
PARKER FULTON,
Of Counsel.

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and JOE ORTECA,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS OF THE COURTS BELOW.

The decision of the Circuit Court of Appeals was rendered on April 8, 1940 and appears in the Record at page 16. The opinion of the Circuit Court of Appeals is reported at 111 F. (2d) 214.

The decision of the District Court appears at page 8 of the Record. It has not been reported.

JURISDICTION.

In accordance with Rule 38, promulgated by this Court, the ground on which the jurisdiction of this Court is invoked is set forth in the Petition at page 2. For the sake of brevity, the ground is not restated.

STATEMENT OF THE CASE.

In accordance with Rule 38, promulgated by this Court, a summary statement of the case has been given in the Petition at page 1 and in the interest of brevity the statement is not repeated.

SPECIFICATION OF ERRORS.

The Circuit Court of Appeals erred in affirming the judgment of the District Court which sustained the demurrer of Respondent, Joe Orteca, to the petition.

ARGUMENT.

The judgment of the District Court was affirmed by the Circuit Court of Appeals on the ground that in a suit for declaratory judgment brought by an automobile liability insurance company against its insured and an injured claimant, the latter having brought suit in a state court, but not yet having obtained judgment therein, a demurrer filed by the injured claimant is properly overruled on the ground that no cause of action is stated against him.

The cases entitled, *Maryland Casualty Co. vs. United Corporation of Massachusetts, et al., Central Surety and Insurance Corporation vs. Norris, et al., Maryland Casualty Co. vs. Consumers Finance Service, Inc. of Pennsylvania, et al.,* and *United States Fidelity and Guaranty Co. vs. Pierson, et al.,* which are listed above at page 4 of the Petition, announce a rule directly contrary to and in conflict with the rule as announced by the Circuit Court of Appeals in the instant case.

The aforementioned cases, decided respectively by the Circuit Courts for the First, Fifth, Third and Eighth Circuits, afford not only the ground for the issuance of a writ of certiorari in this cause but also indicate that, on the merits, the decision of the Circuit Court of Appeals for the Sixth Circuit should be reversed and the cause remanded for further proceedings in the District Court.

Point 1. An Actual Controversy Exists.

That the requisite controversy exists between the parties to this action is apparent from the petition. It sets forth the issuance of an automobile liability policy to the Pacific Coal & Oil Company covering hired automobiles of

the latter. It is then averred in the petition that a collision occurred between an automobile driven by the defendant, Joe Orteca, and a 1931 Ford driven by an employe of the Pacific Coal & Oil Company, as a result of which defendant Orteca received personal injuries and filed suit for the same in the state court. The petition then avers that a controversy exists, involving plaintiff's liability under its policy and its duty to defend the state action now pending, resulting from a dispute as to whether or not the 1931 Ford was a hired car within the meaning of the plaintiff's policy and therefore covered by said policy. (R. 4, 5.)

By the filing of a demurrer, defendant, Joe Orteca, admitted the matters alleged in the petition.

In the case of *Maryland Casualty Company vs. United Corporation of Massachusetts, supra,* the factual situation was identical with that of the case at bar. In holding that the District Court erred in dismissing the complaint on the ground of lack of jurisdiction, Judge Magruder had this to say concerning the existence of a "controversy" at page 446:

> "We think that the present case presents a 'controversy' within the language of the *Haworth* case. There is a dispute between the parties as to the present contractual obligation of the insurer to defend the Assured in the litigation pending in the state court. If the Assured's claim is well founded, the insurance company will be committing a present breach of contract in failing to defend. If the insurer's claim is correct, it has no obligation to defend, because of non-coverage, and it has no concern over the outcome of the state court litigation because even if the Assured is there held liable he is not entitled to indemnity from the insurer. The plaintiff in the present declaratory judgment action having joined as parties defendant the Assured and the Dunham executors who are suing the Assured for damages in the state court, the federal court is in a position to make 'an immediate and

definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged.' It can determine once and for all (1) that the insurer is, or is not, under an obligation to defend the action in the state court; (2) that the Assured if held liable in that action is, or is not, entitled to indemnity from the insurer under the policy, and (3) that if the Dunham executors obtain a judgment against the Assured in the pending cause of action they will, or will not, be entitled to bring proceedings for equitable attachment against the insurer. This certainly seems to be a controversy 'appropriate for judicial determination.' Many cases have so held, on similar facts. *Maryland Casualty Co. v. Consumers Finance Service, Inc.*, 3 Cir., 101 F. 2d 514; *Central Surety & Insurance Corp. v. Norris*, 5 Cir., 103 F. 2d 116; *United States Fidelity & Guaranty Co. v. Pierson*, 8 Cir., 97 F. 2d 560; *Associated Indemnity Corp. v. Manning*, 9 Cir., 92 F. 2d 168."

Judge Magruder also alluded to the leading case of *Aetna Life Insurance Co., v. Haworth*, 300 U. S. 227; 81 L. Ed. 617 (1931) from which we quote the following language (81 L. Ed. at 621):

> "The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. * * * It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages."

Point 2. The State Suit Does Not Bar This Action.

In the following cases the pendency of a suit in the state court between the injured party and the assured was held not to deprive the insurer of its right to a declaratory judgment.

Maryland Casualty Co. vs. United Corporation of Mass., et al., supra;

Central Surety and Insurance Corporation vs. Norris, et al., supra;

Maryland Casualty Co. vs. Consumers Finance Service, Inc., of Pennsylvania, et al., supra;

United States Fidelity and Guaranty Co. vs. Pierson, et al., supra;

Farm Bureau Mutual Automobile Insurance Co. vs. Daniel, et al., 92 F. (2d) 838 (4th Circuit, 1937);

Ohio Casualty Insurance Co. vs. Gordon, et al., 95 F. (2d) 605 (10th Circuit, 1938);

Western Casualty and Surety Co. vs. Beverforden, 93 F. (2d) 166 (8th Circuit, 1937);

Maryland Casualty Co. vs. Sammons, et al., 99 F. (2d) 323 (5th Circuit, 1938);

Carpenter et al. vs. Edmonson, 92 F. (2d) 895 (5th Circuit, 1937);

American Motorists Insurance Co. vs. Busch, et al., 22 F. Supp. 72 (S. D. Cal., Central Division, 1938).

We also respectfully call the Court's attention to the case of *Ryan v. The Employers' Liability Assurance Corporation, Ltd.*, ... U. S. .....; 84 L. Ed. 1008, the same being case No. 967 of the October, 1939 Term of the Supreme Court of the United States. This was a case involving substantially the same facts as in the case at bar, the only exception being that in the *Ryan* case the injured claimant had already taken judgment against the assured in the state court. The District Court dismissed the bill.

The Circuit Court for the Sixth Circuit reversed the judgment and remanded the case. From the Circuit Court's judgment of reversal, one of the defendants sought a writ of certiorari which was allowed by this Honorable Court at the October Term, 1939.

Point 3. Petitioner Has a Cause of Action Against Joe Orteca.

In *Central Surety and Insurance Corporation vs. Norris, et al., supra,* the injured claimants had previously brought suit in the state court. Their suits were pending at the time that the insurer brought its action for a declaratory judgment. The District Judge sustained a motion to dismiss the claimants who had sued in the state court. In reversing the dismissal and remanding the cause for further proceedings, the court said at page 116:

> "The plaintiffs in the two suits pending in the State court should not have been dismissed. While they have not sued the Insurance Corporation, and are not interested in the question whether the Corporation is bound to defend their suits, yet if they win they will, or at least may, implead the Corporation by garnishment or other means to obtain payment of their judgments. In such case the question whether the policy applies will have to be decided again. It would be very inconvenient if the federal court should, these plaintiffs not being parties, decide that the policy does not apply, and the Corporation should not defend the actions and the plaintiffs should recover and then the State court should decide the policy does apply. The interest of Ruddell and Rosser in the question the Insurance Corporation is trying to get adjudicated by a declaratory judgment is real and substantial though not immediate. They ought to be retained as parties to be heard on it and to be bound by the result. *Central Surety & Ins. Corp. v. Caswell,* 5 Cir., 91 F. 2d 607."

In *Maryland Casualty Company vs. Consumers Finance Service, Inc. of Pennsylvania et al., supra,* the facts

were practically identical with those in the preceding case and the case at bar. In holding that the injured claimants were necessary and proper parties, the court said at page 515:

> "It is settled that a controversy between an insurer and its insured as to the extent of the insurer's responsibility under the insurance policy involves the rights of the insurer and will support a declaratory judgment proceeding. *Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000; *Columbian Nat. Life Ins. Co. v. Foulke,* 8 Cir., 89 F. 2d 261; *Farm Bureau Mut. Automobile Ins. Co. v. Daniel et al.,* 4 Cir.; 92 F. 2d 838; *Western Casualty & Surety Co. v. Beverforden,* 8 Cir., 93 F. 2d 166; *Maryland Casualty Co. v. Hubbard,* D. C., 22 F. Supp. 697. It is equally clear that in such a proceeding involving an automobile liability policy persons injured in the accident in question are necessary and proper parties."

At page 516 the court said:

> "The only question which will arise in the suits by the injured parties against Finance Service, however, is as to the liability of Finance Service to them. The question as to the duty of the Casualty Company to defend will not be involved and cannot be adjudicated in those proceedings. The company is, therefore, entitled to have the extent of the coverage of its policy declared in the present proceeding. We accordingly conclude that the court below exceeded its discretionary power in dismissing the petition for a declaratory judgment."

In *United States Fidelity and Guaranty Company vs. Pierson et al., supra,* the plaintiff company sought a declaratory judgment for its liability under an automobile policy issued to the defendant Shrigley. The defendant Pierson had filed an action in the state court to recover for bodily injuries caused his wife by the operation of the insured automobile. The Circuit Court of Appeals for the Eighth Circuit reversed the ruling of the trial court which

granted the motions to dismiss, holding that the action was properly brought against all of the defendants, including the injured party.

To the same effect, see *Maryland Casualty Company vs. United Corporation of Massachusetts, supra.*

CONCLUSION.

Petitioner submits that in view of the numerous cases continually arising under the Declaratory Judgments Act and the desirability of securing a uniform rule among the several circuits with respect to questions touching the Act, the writ of certiorari should issue as prayed for by petitioner; and that upon the final determination of this cause on its merits, the judgment of the Circuit Court of Appeals should be dismissed and the cause remanded for further proceedings according to law.

Respectfully submitted,

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